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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

Civil No. 7097

THE MOTOR HAULAGE COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the revised rules of the Supreme Court of the United States, the plaintiff appellant respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above entitled cause sought to be reviewed.

A. Jurisdiction

The statutory provisions believed to sustain the jurisdiction of the Supreme Court to review on direct appeal the final decree entered in this cause by the Court below are contained in U. S. C., Title 28, Section 47a, which provides:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in

like manner as appeals are taken under existing law in equity cases" (36 Stat. 1150; 38 Stat. 220).

This cause being an action "to enjoin, set aside, annul, and suspend an order of the Interstate Commission" is a case "specified in Section 44 of this title."

The following decisions sustain the jurisdiction of the Supreme Court to review the final decree and order on direct appeal in this cause:

Thompson v. *United States,* 321 U. S. 19;
United States v. *Carolina Carriers Corp.,* 315 U. S. 475;
United States v. *Rosenbloom Truck Lines,* 315 U. S. 50;
Crescent Express Lines v. *United States,* 320 U. S. 401.

B. The Statutes of the United States Which Are Involved

The validity of a statute of a state or of a treaty of the United States is not involved.

The statutory provisions involved are Section 203(a) (15), Section 204(a) (2) and (6) and Section 209(a) of the Interstate Commerce Act (U. S. C. Title 49, 1947 Supplement, Sections 303(a) (15), 304(a) (2) and (6) and 309(a)).

C. Date of the Judgment and decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on January 20, 1947. The petition for appeal, together with the assignment of errors, were presented and allowed on March 10, 1947.

D. Nature of the Case and of the Rulings of the District Court

This is a suit brought in the United States District Court for the Eastern District of New York under the provisions of U. S. Code, Title 28, Sections 41 and 43 to 48, in-

clusive, seeking a review of and a final decree setting aside, annulling and enjoining an order of the Interstate Commerce Commission in proceedings before it entitled *The Motor Haulage Company, Inc., Contract Carrier Application*, Docket No. MC-31214 on the Commission's docket. The proceedings were upon the application of plaintiff, seasonably filed, for the issuance to it under the provisions of the so-called grandfather clause of Section 209 of the Interstate Commerce Act of a permit authorizing it to continue to engage in transportation in interstate commerce as a contract carrier of property by motor vehicle. Two reports were made by the Commission. The original report, not printed in full, is summarized in 43 I. C. C. 802. A second report is printed in full in 46 I. C. C. 107.[1]

The decision of the Commission and the order issued pursuant thereto were dated January 7, 1946. The order was thereafter modified to become effective on November 1, 1946, and following the commencement of this suit the Commission, at the request of the court, further postponed the effective date of its order, from time to time. Following the decision of the District Court dismissing plaintiff's petition, the Commission again voluntarily postponed the effective date of its order to March 1, 1947.

Plaintiff is a corporation organized under the laws of the State of New York in 1916. Since that time it has been continuously engaged in motor carrier operations in both intrastate and interstate commerce. The major part of its business has been for large industries under individual or special contracts by which plaintiff undertakes to per-

[1] The second report of the Commission of January 7, 1946, also dealt with the application of Bonner Haulage Co., Inc., Docket No. MC-60387, for a permit as a contract carrier. However, the proceedings on the two applications were entirely separate and were in no wise consolidated, nor is there any relation between the parties. This suit does not challenge the Commission's findings and order in respect to Bonner.

form their trucking in accordance with their particular requirements, to rent or furnish to them the motor vehicle facilities which they may require. A small part of its business consists of the handling of individual shipments under contracts arranged by telephone and generally confirmed by letter.

With some exceptions, plaintiff's business is conducted and the use of its vehicles is confined within a radius of fifty or sixty miles of Columbus Circle, New York, N. Y. Its headquarters are in Brooklyn, New York.

The Commission found that plaintiff was entitled under the grandfather clause of Section 209 to a permit. However, its order of January 7, 1946 attached various limitations and specifications to the permit and plaintiff's right to engage in transportation which plaintiff believes to be beyond the authority of the Commission and not justified by the evidence as to its former operations and business.

Hence, it has instituted this suit. By its petition it attacked the Commission's order in various respects and on various grounds. The District Court, after hearing, and with the evidence taken by the Commission before it, upheld the Commission's order in all respects and dismissed plaintiff's petition.

As to some respects in which plaintiff believed that the Commission's order denied it rights to which it was entitled, plaintiff proposes to seek relief from the Commission.

In certain other respects plaintiff's challenge of the Commission's order depended upon the interpretation of its terms. These have been held by the District Court to have a meaning and effect which removes plaintiff's grounds of objection.

There are, however, two features of the Commission's decision and order which the District Court has sustained,

as to which neither of these courses of relief is open to plaintiff since they involve questions of law and of the Commission's authority under the Act as well as of the sufficiency of the evidence to sustain its action. It is as to these that this appeal is taken.

One phase of plaintiff's business consists of the renting of equipment under so-called "contracts of rental without responsibility." Under those contracts plaintiff leases trucks and equipment to concerns on a mileage basis or at agreed amounts per day, week or month, to be used by the lessees as they may see fit. These contracts are referred to as "contracts of rental without responsibility" because under the contracts plaintiff does not undertake to transport and assumes no responsibility for loss of or damage to cargo which may be loaded and carried on the leased equipment. Plaintiff issues no receipt for any goods loaded in the trucks and does not know what the trucks may be used for or where they may be sent. When the trucks are leased on a time basis, the lessee must pay the stipulated rental whether the trucks are used or not. Plaintiff usually agrees to maintain the leased equipment in good order and repair, to carry personal injury and property damage insurance, and to garage and fuel the trucks. In some instances plaintiff, at the lessee's request, supplies drivers to operate the trucks and, in other instance, the drivers are furnished by the lessee. When plaintiff supplies drivers, it also agrees, upon request, for the convenience of the lessee, to pay in the first instance the wages, compensation insurance and social security taxes of the drivers and to bill the lessee therefor at cost, plus a nominal handling charge. From the time the drivers report to the lessee, however, they are under the lessee's exclusive direction and control so far as concerns the movement of the trucks. The lessee directs the movement of the trucks and supervises the work of the drivers in the same manner as if the

trucks were owned by him and the drivers were his own regular employees.

The Commission determined that when plaintiff, under these contracts, rented trucks but did not furnish drivers for the operation of the leased equipment, the transactions were simply agreements for the lease of equipment and that consequently the transportation performed thereunder was private carriage by the lessee and not transportation by plaintiff as a carrier for hire. This ruling has not been challenged.

The Commission determined, however, that if plaintiff, at a lessee's request, furnishes a driver to operate a rented truck, plaintiff becomes a carrier and is itself engaged in transportation subject to the Interstate Commerce Act, notwithstanding that it is not a bailee of any goods loaded on the truck and does not undertake, in any way, to transport or be responsible for such goods.

The District Court upheld this determination. Plaintiff assigns its action in so doing as error. There is raised here the question whether one can be a carrier subject to the Act without being a bailee, whether one is a contract carrier within the definition of the Act if it does not contract to transport goods, and whether the mere fact that a driver is furnished who remains on the lessor's payroll causes the lessor to have such directions and control of a truck and its operations as to be a carrier within the terms of the Act. These are questions not settled by previous decisions of the courts.

The second feature of the decision of the District Court which is assigned as error is its upholding of the limitation imposed by the Commission upon the permit to transport general commodities which is in the following terms:

> "Limited to a service wherein motor vehicles, accompanied by drivers employed by applicant and who

operate such vehicles, are assigned to shippers under continuing contracts, for the exclusive use of such shippers in transporting such shippers' property."

By its petition plaintiff alleged that each of the foregoing limitations was invalid and beyond the statutory authority of the Commission. The court below sustained the validity of each. As to the portion of the limitations restricting the service to the vehicles "accompanied by drivers employed by applicant", the nature of the findings by the court below is such that an appeal therefrom is not considered necessary.

Appeal is taken, however, from the finding and conclusion of the District Court upholding the limitations that plaintiff may transport general commodities only in motor vehicles assigned "for the exclusive use of such shippers in transporting such shippers' property" and only "under continuing contracts". These limitations would prevent plaintiff from commingling the freight of two or more shippers on one truck at the same time or from contracting for a single movement.

It is the contention of the plaintiff that such limitations, which would restrict the manner in which it should use its equipment in the performance of transportation, in which it is authorized to engage and would specify the form of contracts it may enter into with its shippers are beyond the authority of the Commission under the Act, would constitute unreasonable and arbitrary interferences with the right of plaintiff to manage its business in the most efficient and economical manner and to contract for transportation, and, moreover, are contrary to and without support in the evidence in that they would prevent plaintiff from continuing business in which it was engaged on the so-called grandfather clause date.

E. Opinion, Decree and Order of the District Court

Appended to this statement are (1) copy of the opinion and final decree of the District Court dated January 20, 1947, dismissing plaintiff's petition in the above entitled cause and (2) order of the Court dated February 28, 1947, restraining the enforcement of the Commission's order for a period of 60 days from January 20, 1947. It will be the purpose of plaintiff to apply immediately to a Justice of the Supreme Court of the United States for a further stay restraining enforcement of the Commission's order beyond March 20, 1947, pending the appeal taken from the decision of the District Court of the United States.

Prayer for Reversal

WHEREFORE appellant prays that this appeal may be heard and that the judgment, decree and order of the District Court may be reversed.

Respectfully submitted,

PARKER MCCOLLESTER,
Counsel for Appellant.

LORD, DAY & LORD,
Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil #7097

THE MOTOR HAULAGE COMPANY, INC., *Plaintiff*,

against

UNITED STATES OF AMERICA, ET AL., *Defendants*

January 20, 1947.

Action by The Motor Haulage Company Inc., against the United States of America and the Interstate Commerce Commission, as intervening defendant, to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission, granting a permit to plaintiff to operate as a contract carrier (28 U. S. C. A. §§ 41, 43-48).

APPEARANCES:

Lord, Day & Lord (Parker McCollester, P. G. Martin and Frank J. Clark on the brief) for plaintiff.

Edward Dumbauld, Special Assistant to the Attorney General, for the United States of America.

J. Stanley Payne, Asst. Chief Counsel, Interstate Commerce Commission (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission on the brief) for defendant Interstate Commerce Commission.

H. Lauren Lewis and Robert J. McBride, attorneys for Regular Common Carrier Conference of the American Trucking Associations, Inc. on the brief.

Before Clark, Circuit Judge, and Byers and Kennedy, District Judges

KENNEDY, *D. J.*:

I

This is a suit to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission (28 U. S.

C. A. 41, 43-48). Plaintiff, prior to August 9, 1935, the date of the enactment of the Interstate Commerce Act, Part II, dealing with motor carriers (49 U. S. C. A. §§ 301-327), was engaged in certain operations with motor vehicles, which will be dealt with in detail later.

On February 4, 1936 plaintiff filed its application with the commission claiming rights under the "grandfather clause" of the act (Interstate Commerce Act, part II, sec. 209(a); 49 U. S. C. A. § 309(a)). Preliminary proceedings were had and formal hearings held before an examiner on October 27, 1938 and between November 10th and November 16, 1938. The examiner proposed a report dated July 12, 1939 to which plaintiff filed exceptions on July 31, 1939. On April 11, 1944 a report and order were filed by Division 5 of the commission, whereupon plaintiff filed a petition asking that the matter be reconsidered by the entire commission (43 M. C. C. 802). As a result of the last proceeding the order of Division 5 was set aside and on January 7, 1946 the commission filed its decision and made and entered the report and order which plaintiff now seeks to set aside (46 M. C. C. 107). On March 9, 1946 plaintiff petitioned the commission for amendment and modification of its second report, but the commission denied the application. The complaint in this action was filed on June 15, 1946.

II

Plaintiff was organized under the laws of the State of New York in 1916 and ever since has been continuously engaged in motor carrier operations both in intrastate and interstate commerce. With certain exceptions, not important for this outline, plaintiff's business was conducted within a radius of 50 or 60 miles from Columbus Circle, New York. Its headquarters are in Brooklyn, New York.

Plaintiff owned, at the time of the hearings before the commission, 8 types of motor trucks and semi-trailers which it describes as follows: (1) station wagons, rack platform, and van body trucks, and semi-trailers for general merchandise, (2) van body trucks equipped with armored cabs and alarms for handling valuables, (3) insulated van bodies for handling fresh meats, (4) insulated and heated bodies for

handling wines and liquors in the winter time, (5) winch trucks for handling large and bulky pieces, (6) bodies equipped with special racks and scaffolding for handling metal car signs, (7) small delivery trucks for handling express shipments, (8) Reach semi-trailers 48 feet long for handling airplanes.

Both the commission and the plaintiff took the view that the latter's business could be divided into 5 categories, described in the plaintiff's brief thus:

(1) *Contracts of rental without responsibility.* Here plaintiff leases trucks and equipment on a mileage basis or at agreed amounts per day, week or month. Plaintiff says that it does not undertake to transport the cargo under these contracts. It agrees to maintain the trucks in good order and repair, to carry personal injury and property damage insurance and to garage and fuel the trucks. When it supplies drivers, it pays their wages, compensation insurance, and social security taxes. For these amounts plaintiff bills the "lessee" at cost plus a handling charge.

(2) *Contracts of rental with responsibility.* Under this type of arrangement, differing from the above only in the matter of carrier's responsibility, plaintiff is liable for damages if the cargo is lost or injured. Compensation is on a mileage or time basis per truck.

(3) *Tonnage contracts.* All parties agree that these are transportation contracts. Compensation is computed on a weight measurement or other unit basis in the same way as under contracts of rental with responsibility. Plaintiff, under its tonnage contracts, undertakes to provide services which will meet the peculiar transportation needs of the customer.

(4) *Special service contracts.* These contracts really cover very peculiar trucking operations and services such as the hauling of new airplanes, the picking up of crashed planes, the distribution of telephone directories, and the transportation of large illuminated car signs and equipment specially designed for the purpose.

(5) *Miscellaneous trucking contracts.* Under these contracts the plaintiff handles shipments in and around the New York metropolitan area under individual agreements, the arrangement usually being made by telephone and later confirmed in writing. Only about 5% of plaintiff's total business was in this category, and of that 5% unquestionably a very large amount was within the "New York Commercial Zone".[2]

III

We now turn to the order of the commission, which plaintiff attacks. Authority was granted to the plaintiff to transport over irregular routes; (1) general commodities, with certain exceptions, and subject to certain limitations which must be noticed in greater detail at a later point; (2) malt beverages to certain points in New Jersey and in Connecticut; (3) telephone directories between New Jersey and points in Long Island, Rockland and Westchester Counties and Fairfield, Connecticut; (4) illuminated car signs from New York to Berwick, Pennsylvania; (5) damaged airplanes from points in 13 states and the District of Columbia within 250 miles of Columbus Circle, New York, New York, to points in Long Island and New York.

Plaintiff's quarrel with the action of the commission concerns itself principally with the first division named above, although a point is made about that portion of the order which deals with malt beverages. Plaintiff also complains about other specific findings of the commission to be mentioned later. For present purposes, it is, however, sufficient to point to the fact that the last 4 paragraphs of the commission's order concern themselves with specific commodi-

[2] This zone was defined in *New York Commercial Zone*, 1 M.C.C. 665. The commission's order was sustained by a statutory court in *Noeding* v. *U. S.*, 29 F. Supp. 537. The statutory basis for such zoning is to be found in the Motor Carriers Act, sec. 203(b)(8) and was discussed in *U. S.* v. *Capital Transit Co.*, 325 U. S. 357-360. Substantially, when the commission under the authority of that statute has defined a certain area, intrastate transportation within that zone is not subject to the Interstate Commerce Act and interstate transportation, unless conducted under a common control management or arrangement for continuous carriage or shipment to or from a point beyond the zone is exempt from the provisions of the Motor Carriers Act, except those relating in general to safety of operation.

ties, which plaintiff had been transporting prior to the effective date of the grandfather provision and we read this order to mean that plaintiff may carry these specific commodities without limitation other than the stated geographical limitations. But in the operation of the order dealing with the carriage of "general commodities" the commission imposes not only geographical limitations but also restrictions concerning the character of the commodities and the conduct of the operation itself.

IV A

The order permits the plaintiff to carry general commodities, except live stock, commodities in bulk, dangerous explosives, and household goods. These exceptions were derived from one of the commission's own precedents (*Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467). Plaintiff urges that the commission erred in applying to it restrictions which had been found appropriate for other contract carriers, because under its system of operation it merely rents the truck and is not concerned with how the "lessee" uses it. It says that under its practice, certainly in contracts "without responsibility", it does not and did not know anything about the contents of the trucks, and that the exception arbitrarily limits the scope of its operations as they were conducted on the grandfather date.

IV B

The order, dealing with general commodities, provides further that general commodities shall be transported by plaintiff only between points in the New York Commercial Zone and those in New Jersey within 10 miles of Jersey City, New Jersey, or to points in Connecticut, New Jersey and New York within 40 miles of Columbus Circle. Concerning this, it contends that the 40-mile limit is too small; that on the grandfather date it was performing transportation services well beyond the area in which its operations would now be limited by the commission's order.

IV C

We think that the issues may be made clearer if we deal at this point with plaintiff's complaint about the restrictions placed by the commission upon the transporting of *general* commodities so far as they relate (1) to the character of the commodities and (2) the geographical area of transportation. We believe that by the commission's order plaintiff received the "substantial parity" required by the precedents (*Alton Railroad Co. et al. v. U. S.*, 1942, 315 U. S. 15, 22). It seems to us that plaintiff's argument for wider grandfather rights in these particulars is based not so much upon what it actually did prior to the critical date as upon what it *might* have done. It might, for example, have transported household goods under its contracts, or it *might* have covered an area greater than that set by the commission. But we do not believe that the grandfather clause is to be interpreted in any such manner. We think the statute means that the commission should take into consideration only actual operations, and not mere possibilities (*McDonald v. Thompson*, 1938, 305 U. S. 263, 266, cited in *U. S. v. Carolina Carriers Corp.*, 1942, 315 U. S. 475, 480).

Some doubt arises, however, as to the propriety of the action of the commission under this head so far as it concerns one item, namely, the transportation of new airplanes. Clearly it was intended in this case (43 M. C. C. 802) that plaintiff should have the right to transport new airplanes from points in Nassau County to points within the New York Commercial Zone and also to return damaged or rejected shipments. Apparently, through inadvertence, this provision was not carried in to the order as finally entered, an omission which plaintiff failed to call to the attention of the commission. Counsel for the commission on the argument at first seemed to take the position that plaintiff's rights had been lost through inaction, a contention which we should be very reluctant to accept under the circumstances here. But later counsel put forward what we believe to be the true explanation: that new airplanes were intended to be included in the general commodities which plaintiff is entitled to transport. We do not

know whether the territorial limitation which the commission made applicable to general commodities would interfere with this operation, which Division 5 in its report found that the plaintiff had conducted, and which the commission noted in its report. But in its brief the commission says before us that the 40-mile radius, under its practice and interpretation, embraces all of Nassau County, Long Island, and, if that is so, plaintiff, under the general commodities section of the order, has not been deprived of its right to transport new airplanes.

V

We come next to another point raised by plaintiff which we do not think requires extended discussion, namely, the transportation of malt beverages. Plaintiff complains that Sullivan and Rockland Counties were omitted from the permitted area of operations. But Rockland County is within the 40-mile radius applicable to general commodities and malt beverages are certainly not excepted. With respect to the omission of Sullivan County, New Haven and Hartford, Connecticut, and other areas, concerning which plaintiff complains, the action of the commission was based upon its reading of the evidence and its conclusion that there was no proof of actual shipments to these areas prior to the grandfather date. The commission chose to give greater weight to the documentary evidence than it did to oral evidence, sometimes vague, which was not reflected in or borne out by these documents, and we do not think the commission's findings should be disturbed.

VI

We come now to what we consider the major issues in the cause. Of course, whenever, because the grandfather clause does not apply, the transportation of specific commodities is denied to the plaintiff, or whenever there has been what plaintiff considers undue restriction on the geographical area of its operation, there is still open to plaintiff the remedy of application for a supplementary permit which the commission may grant if it finds justification therefor (Interstate Commerce Act, part II, sec.

209(b); 49 U. S. C. A. § 309(b)). But in two respects at least the commission has put limitations upon the operations of plaintiff which bear all the earmarks of finality: (1) it has said that even with respect to its so-called contracts without responsibility, plaintiff is a "contract carrier", and (2) it has placed upon plaintiff certain definite limitations in the execution of its contracts (other than those dealing with specific commodities, like car signs, malt beverages, etc.). The limitations just referred to are as follows: in the execution generally of its contracts, plaintiff's vehicles must be (1) accompanied by drivers "employed by applicant and who operate such vehicles", and (2) assigned to shippers "under continuing contracts", and, also (3) for the "exclusive use" of the shippers.

VII

Plaintiff says that the commission is in error in holding that its operations (in carrying without responsibility) come within the description of contract carriage. It urges that it is not a carrier at all, so far as its contracts without responsibility are concerned, because it is not a bailee of the goods but merely a lessor of the vehicle. It prefers to call its clients not shippers but lessees. The commission, on the other hand, found that even when plaintiff turned the driver and truck over to a "lessee" who then used that vehicle for its own purposes prescribing routes, there still remained a "presumption" of control by the plaintiff which brought it within the category of a contract carrier under the act.

We are confident that the commission was right in its determination. Whether the legal relationship between the plaintiff and its shippers could be brought within the confines of a common law bailment is not the important question. The real issue to be decided is whether under this particular statute the commission was right in holding, even with respect to contracts without responsibility, that "plaintiff is a person which, under individual contracts or agreements, engages in the transportation * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation" (Interstate Com-

merce Act, part II, sec. 203 (a) (15)). We emphasize that we are not speaking of cases where plaintiff merely furnishes the equipment, and the drivers are supplied by the shippers: the commission clearly decided that plaintiff was not a common carrier where such operations are concerned (46 M. C. C. 166). We are speaking of a case where the plaintiff furnishes not only the vehicle but the driver, is compensated on a mileage or time basis, pays the hire and other incidental expense of the driver, agrees to maintain the leased equipment in good order and repair, to carry insurance, and to garage and fuel the trucks, but does not specifically undertake to transport cargo or to be responsible for loss or damage.

Plaintiff's argument seems to center around the question whether, when it exempts itself from liability to the shipper, it ceases to be engaged in transportation as a matter of law. True, the proof is by no means clear that plaintiff conducted such operations on a wide scale prior to the grandfather clause.[3] But assuming that it did, it cannot be fairly said that responsibility to the shipper is the sole test. Plaintiff itself cites *Thompson v. U. S.*, 1944, 321 U. S. 19, as conclusive on the point that "direct and complete control" of the movement and handling of the freight is the test that should be applied. In the case at bar the commission has found that the "presumption" of control by the plaintiff was not overcome by any of the evidence before it.

We see no inconsistency in a finding that plaintiff, even though without responsibility to the shipper, is still so far in control of the movement that it is engaged in transportation under the act. Plaintiff's position in the case at bar is far more closely analogous to that of the plaintiff in the

[3] The commission mentions specifically only one "contract without responsibility" in force at the grandfather date (the D. Emil Klein contract; 46 M.C.C. 166, petition, p. 57). The report of Division 5 might give the impression that there were more. But we think this would be a mistaken impression particularly in the light of the testimony of plaintiff Vice President Hoffman. We doubt that the Liebmann contract and the Wells Fargo contract in fact come within the category mentioned, and if the Klein contract is within that classification, it is by virtue of an amendment made after the grandfather date.

Thompson case than it is to that of the operators whom Thompson hired. It should not be necessary to analyze the legal obligations of plaintiff to determine the question whether it comes within the purview of the statute. The commission properly refused to base its determination upon a single specific phase of the contractual relationship between plaintiff and its clients,[4] and upon all of the facts we agree with that conclusion.[5]

VIII

We come now to the three limitations which the commission placed upon plaintiff's carriage of general commodities, namely, (1) that the carrying vehicles must be accompanied by drivers "employed by applicant and who operate such vehicles," and (2) that they must be assigned to shippers "under continuing contracts," and (3) that they must be for the "exclusive use" of the shippers.

As the transcript of the testimony shows, plaintiff, certainly at the time of the hearings and probably during all of the period before and after the grandfather date had a small amount of telephone call business. Thus it has a salesman who specializes in the solicitation of such business.

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[4] Even in the field of common law liability on the part of motor vehicle owners to third parties, where control of the vehicle is in some sense of the word divided, the courts have rejected the idea that any particular incident of the legal relationship determines who is the employer of the driver (*Irwin* v. *Klein*, 1936, 271 N. Y. 477; *Rumberger* v. *Welch*, 2 C. C. A., 1942, 131 F. 2d 384).

[5] Plaintiff, for example, argues that control of the movement is largely in the hands of the shipper, because it selects the routes. But this, it seems to us, is not true of the procedure followed under the contract with the American Tobacco Co. nor under the contract with Liggett & Myers. These, we emphasize, are contracts with responsibility concerning which plaintiff does not challenge the finding of the commission, at least quite as vigorously as it does in the case of contracts without responsibility. There are cases (*e. g.*, the contract with *Fritzche Bros.*), where an employee of the shipper selects the routes. On the other hand there are instances (*e. g.*, the Colgate-Palmolive-Peet Co. contract) where plaintiff actually maintains an office on the shipper's premises and pays for it. The point we make is that if plaintiff's handling of general commodities is viewed on the facts as a whole, then it is clearly engaged in transportation and this is true in the case not only of contracts with responsibility and tonnage contracts, but also of contracts without responsibility.

This type of carriage amounts to about 3 or 4% of plaintiff's business. However, plaintiff's practice is not and was not to solicit any "less than truckload" miscellaneous business for distribution outside of the exempt area, unless that business moved or originated in truckload lots at the point of pick-up. It would, however, solicit truckload lots to any point within an area of 40 or 50 miles of New York City. From all this it clearly appears that the "miscellaneous" business which has been and is being carried on by plaintiff surely amounts to a very tiny and insignificant fraction of its operations, so far as the regulatory power of the commission is concerned. By this we mean that it is not correct to assume that on the grandfather date or since, the miscellaneous business of plaintiff amounted to as much as 5% of the total: so far as the action of the commission is concerned, it is necessary to consider that the proportion of this percentage, which would be carried on beyond the exempt area, is negligible, if indeed there is anything in the record to sustain the contention that there was any at all.

Against such a background, plaintiff's argument, that the limitations on its transportation of general commodities just mentioned would deprive it of its miscellaneous business, can be given very little weight.

Plaintiff seems not to quarrel with the proposition that its "house" contracts (contracts with responsibility, contracts without responsibility, and tonnage contracts) are properly subject to the restrictions we have mentioned. Indeed on this record it is almost impossible to conceive of a shipper's entering into any one of these three types of contract with plaintiff *unless* that contract provides for (1) vehicles to be operated by employees of the plaintiff, (2) assigned to a particular shipper, and (3) for his exclusive use. But after describing its miscellaneous business as a system of pick-ups made as a result of telephone calls and sometimes in small lots, plaintiff urges that the imposition of these limitations by the commission destroys that negligible fraction of its business in violation of its rights under the grandfather clause. The record makes it clear to us that plaintiff's miscellaneous business involved scarcely an instance where its vehicles were assigned to more than

one shipper for his exclusive use.[6] But plaintiff says the first limitation imposed upon it by the commission, namely, that vehicles assigned to shippers must be driven by "employees" of plaintiff, will prevent it from supplementing its own equipment by renting from some other trucking concern vehicles driven by employees of the latter. There is nothing in the record to indicate that plaintiff often did this. But if there were such evidence, we believe that plaintiff could hire such vehicles and still remain within the order complained of, because undoubtedly the driver of the hired vehicle would be the "employee" of plaintiff, *ad hoc* at least, under its method of operation.

The commission's action is not difficult to understand. It had classified plaintiff as a contract carrier. In line with the declared purposes of the statute,[7] it evidently wished to prevent any encroachment by the plaintiff on the field of common carriage, at least in interstate commerce, and

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[6] If the record *had* disclosed a practice of this sort carried out on a wide scale, which it does not, it would be hard to justify the finding of the commission that plaintiff was a contract, not a common carrier.

[7] By the Act of September 18, 1940, c. 722, Title I, sec. 1, 54 Stat. 899, Congress, speaking of the Interstate Commerce Act, said:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Even though the above policy was expressed as an amendment in 1940, the declaration of purposes affords a demonstration of the legislative intent throughout the period of Congressional control of motor trucking, and other forms of transportation under the statute as originally enacted.

beyond any exempt area. Since a contract carrier, unlike a common carrier, may choose its customers and, within limits, the form and character of its obligation, it should not, while enjoying those privileges, be allowed at the same time to compete in the field of common carriage. To have allowed plaintiff to do what it apparently desired would have been to sanction what the declaration of policy quoted in the margin, called "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices".

If plaintiff had shown that any substantial proportion of its "miscellaneous" business was carried on beyond the exempt area at the grandfather date in interstate commerce subject to regulation by the commission, we should be dealing with an entirely different situation. But, by the same token, the commission's order in such a case would undoubtedly have been very different from the one now before us. It is sufficient now to say that the order here under review, so far as plaintiff's miscellaneous business is concerned, leaves plaintiff substantially where it was prior to the grandfather date.

Our examination of the record and consideration of the argument, written and oral, convinces us that the order complained of was provident and should be sustained.

The clerk is directed to enter judgment for the defendants on the merits, with costs, immediately upon receipt of this opinion and direction.

CHARLES E. CLARK,
Circuit Judge,
MORTIMER W. BYERS,
District Judge,
HAROLD M. KENNEDY,
District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil No. 7097

THE MOTOR HAULAGE COMPANY, INC., *Plaintiff*,

against

UNITED STATES OF AMERICA, ET AL., Defendants

Order Granting Interlocutory Injunction

The undersigned, constituting a specially constituted court of three judges pursuant to the Urgent Deficiencies Act, 28 U. S. C., Sections 41, 43-48, having, after full hearing, by its decision and decree of January 20, 1947, pursuant thereto, dismissed the petition of the plaintiff herein, seeking to have set aside and permanently enjoined the order of the Interstate Commerce Commission dated January 7, 1946, entered in a proceeding before that body entitled *The Motor Haulage Company, Inc., Contract Carrier Application*, Docket No. MC-31214, and the effective date of said order having been postponed from time to time so that it is now to become effective on March 1, 1947, and plaintiff having indicated its intention to appeal from said decision, order and decree of this court to the Supreme Court of the United States, as by statute provided, and plaintiff by its counsel, having filed a petition praying an order of this court staying the aforesaid order of the Interstate Commerce Commission and enjoining the enforcement thereof pending the taking of such an appeal and thereafter pending final determination of such appeal and the entry of an order pursuant thereto, and having filed in support of such petition the affidavit of James A. Hoffman, President of plaintiff The Motor Haulage Company, Inc., and counsel for the defendants, the United States of America, the Interstate Commerce Commission and the Regular Common Carrier Conference of the American Trucking

Associations, Inc., having been given notice of and served with copies of said petition, of the supporting affidavit of James A. Hoffman, and of the proposed order, and no party having requested oral hearing upon the petition and such oral hearing having been waived, and such counsel as so desired having filed with the Court statements in writing of their position with regard to and their objections to the granting of the stay and interlocutory injunction sought by the aforesaid petition, and this court having been assured that counsel and/counsel for the Regular Common Carriers Conference of the American Trucking Associations, Inc. has indicated that it had no objection to the granting of the stay and interlocutory injunction, and the Court having fully considered the petition and affidavit of plaintiff and the statements of other counsel, and it appearing therefrom and the Court so finding that if the order of the Interstate Commerce Commission is not stayed and its enforcement enjoined pending appeal and determination thereon and if upon such appeal the judgment of this Court shall be reversed and the order of the Interstate Commerce Commission held to be unlawful and invalid plaintiff will have suffered substantial injury for which it will have no means of redress, and it appearing further to the satisfaction of this Court that if the judgment of this Court shall be affirmed on appeal the staying and enjoining of the enforcement of the order of the Commission pending appeal and until determination thereof will not seriously injure any person or persons, and this Court concluding further that reasonable doubt may exist as to the correctness in certain respects of its decision and judgment, now, therefore, it is in open court.

Ordered, adjudged and decreed that the Commission's order of January 7, 1946, as hereinbefore described and as amended from time to time, be and it is hereby stayed and its enforcement enjoined for a period of sixty (60) days from the entry on Jan. 20, 1947 of the order and decree of this Court in the above entitled matter, entered Jan. 20, 1947, and the United States and the Interstate Commerce Commission, their officials, agents and represent-

atives, and all persons are enjoined from taking any action to enforce compliance therewith or because of anything alleged to be in violation thereof done within said period of 60 days from Jan. 20, 1947.

Dated Feb. 28, 1947.

CHARLES E. CLARK,
U. S. C. J.;
MORTIMER W. BYERS,
U. S. C. J.;
HAROLD M. KENNEDY,
U. S. D. J.

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